

REGULAR

NUMBER: 38.813

TITLE: AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF MILPITAS AMENDING CHAPTER 10 OF TITLE XI OF THE MILPITAS MUNICIPAL CODE DEFINING ELECTRONIC SMOKING DEVICE AND HEAD/SMOKE/TOBACCO SHOP AND OTHER RELATED AMENDMENTS

HISTORY: This Ordinance was introduced (first reading) by the City Council at its meeting of _____, upon motion by _____ and was adopted (second reading) by the City Council at its meeting of _____, upon motion by _____. The Ordinance was duly passed and ordered published in accordance with law by the following vote:

AYES:

NOES:

ABSENT:

ABSTAIN:

ATTEST:

APPROVED:

Mary Lavelle, City Clerk

Jose S. Esteves, Mayor

APPROVED AS TO FORM:

Michael J. Ogaz, City Attorney

RECITALS AND FINDINGS:

WHEREAS, electronic smoking devices, commonly known as “e-cigarettes,” “e-cigars,” “e-pipes,” “e-hookahs,” and other similar product name or descriptor are electronic and/or battery operated devices designed to look like and be used in the same or similar manner as conventional tobacco products; and

WHEREAS, electronic smoking devices often mimic conventional tobacco products in shape, size, color, with the user exhaling a smoke-like vapor similar in appearance to the exhaled smoke from cigarettes and other conventional tobacco products; and

WHEREAS, the increasing popularity and use in public buildings of electronic smoking devices has led the United States Food and Drug Administration (“FDA”) to propose regulating electronic smoking devices as tobacco products, a move supported by forty (40) state attorneys general, including California Attorney General; and

WHEREAS, the FDA and the American Journal of Public Health conducted laboratory analysis of electronic cigarette cartridge samples and found they contained carcinogens and toxic chemicals to which users and bystanders could potentially be exposed; and

WHEREAS, the FDA and healthcare providers question the safety of electronic smoking devices to both users and those in close proximity to users, despite the claims of harmlessness by manufacturers; and

WHEREAS, the FDA has raised concerns that electronic smoking devices, which, are often marketed in appealing flavors, can increase nicotine addiction among young people and may lead youth to try conventional tobacco products; and

WHEREAS, the use of electronic smoking devices, with or without nicotine as an ingredient, models smoking behavior to our youth in a way that suggests smoking any substance is acceptable, regardless of potential or unknown health threats to the user and others; and

WHEREAS, the State of California enacted California Health and Safety Code Section 119405 making it unlawful for a person to sell or otherwise furnish an electronic cigarette, as defined under State law, to a person under eighteen (18) years of age and authorizing cities and counties to regulate the distribution of electronic cigarettes in a manner that is more restrictive than State law; and

WHEREAS, three (3) states have laws restricting electronic smoking device use in one hundred percent (100%) smoke-free venues, nine (9) states have laws restricting electronic smoking device use in other venues, and one hundred and eight (108) local laws across the country restrict electronic smoking device use in one hundred percent (100%) smoke-free venues, including fourteen (14) California cities; and

WHEREAS, the use of electronic smoking devices, with or without nicotine as an ingredient, creates a public nuisance as described in detail above and by releasing smoke in the air and exposing others to smoke, and

WHEREAS, the use of electronic smoking devices in smoke-free locations threaten to undermine compliance with smoking regulations and reverse the progress that has been made in establishing a social norm that smoking is not permitted in public places and places of employment; and

WHEREAS, accordingly, the City Council finds and declares that the purposes of amending the City of Milpitas Zoning Ordinances is to protect the public health and welfare by adopting new definitions for Electronic Smoking Device and Head/Smoke/Tobacco Shop and other related amendments;

NOW, THEREFORE, the City Council of the City of Milpitas does ordain as follows:

SECTION 1. RECORD AND BASIS FOR ACTION

The City Council has duly considered the full record before it, which may include but is not limited to such things as the City staff report, testimony by staff and the public, and other materials and evidence submitted or provided to the City Council. Furthermore, the recitals set forth above are found to be true and correct and are incorporated herein by reference.

SECTION 2. AMENDMENT OF MILPITAS MUNICIPAL CODE CHAPTER 10 OF TITLE XI

Section XI-10-2.03 entitled “Definitions” of the Milpitas Municipal Code is amended to add the following definitions as follows:

“Electronic Smoking Device” means an electronic and/or battery-operated device, the use of which may resemble smoking that can be used to deliver an inhaled dose of nicotine or other substances. “Electronic Smoking Device” includes any such device, whether manufactured, distributed, marketed, or sold as an electronic cigarette, an electronic cigar, an electronic cigarillo, an electronic pipe, an electronic hookah, vaporizer or any other product name or descriptor.

“Head/Smoke/Tobacco Shop” means a retail establishment primarily engaged in the selling of smoking and tobacco products and accessories, and other products, devices and components reasonably assumed to be used for smoking and/or the inhalation or injection of any substances. Tobacco products may include but are not limited to cigarettes, cigars, loose leaf tobacco, tobacco pipes, Electronic Smoking Devices and accessories, vaporizers and accessories and any other product, device or component used in the inhalation of tobacco, nicotine or other substance. For the purposes of this definition only, “primarily engaged” means when thirty percent (30%) or more of products sold at the retail establishment are smoking and tobacco products and accessories, and other products, devices and components reasonably assumed to be used for smoking and/or the inhalation or injection of any substances.

Table XI-10-5.02-1 entitled “Commercial Zone Uses” of the Milpitas Municipal Code is amended and replaced in its entirety to read as follows:

Table XI-10-5.02-1
Commercial Zone Uses

Use	CO	C1	C2	HS	TC
1. Commercial Uses					
Alcoholic beverage sales	C ⁶	C	C	NP	C
Art/photography studio or gallery	NP	P	P	P	P
Bookstore	NP	P	P	P	P

Commercial services ¹	P	P	P	NP	P
Funeral home or mortician	NP	NP	C	C	NP
Furniture sales	NP	P	P	P	P
Grocery store (supermarkets)					
Within 1,000 ft. of residential zone	NP	C	C	C	C
Not within 1,000 ft. of residential zone	NP	P	P	P	P
Head/Smoke/Tobacco shop	NP	C	C	NP	C
Home improvement (hardware, blinds, interior decorating, etc.)	NP	P	P	C	P
Not fully enclosed operation	NP	C	C	C	C
Household appliance store ⁷	NP	NP	P	P	NP
Small appliance repair	NP	NP	MCS	P	NP
Large appliance repair	NP	NP	NP	P	NP
Janitorial services	NP	NP	P	P	NP
Newsstand					
Indoor	P	P	P	NP	P
Outdoor	C	C	C	NP	C
Nursery (flower or plant)					
Indoor	NP	NP	P ²	P	P
Outdoor	NP	NP	C	P	NP
Office supply sales (stationary, equipment)	P	P	P	P	P
Paint and wallpaper stores	NP	NP	P	P	P
Pawnshops	NP	NP	C	NP	NP
Pet stores	NP	NP	P	P	P
Printing (newspaper, publishing)	NP	NP	P	P	P
Rentals (medical supplies, costumes, party equipment, office equipment)	NP	NP	P	P	P
Retail stores, general merchandise	NP	P	P	NP	P
Tanning salon	NP	NP	P	NP	P
Thrift store	NP	NP	P	P	P
Tobacco Shop	NP	C	C	NP	C
2. Entertainment and Recreation					
Adult business ³	NP	NP	NP	P	NP
Bowling alley	NP	NP	P	P	P
Commercial athletic facilities					
Indoor	NP	C	P	P	P
Outdoor	NP	NP	NP	C	NP
Motion picture theater (See 7 below)					
Recreation or entertainment facility	NP	C	C	C	C
Shooting range, indoor	NP	NP	NP	C	NP
3. Health and Veterinarian Uses					
Animal grooming (no boarding)	NP	P	P	P	P
Hospital	C	NP	C	C	C
Kennel	NP	NP	C	NP	NP
Massage establishment	NP	NP	C	C	C
Medical and dental office	P	P	P	NP	P
Medical and dental clinic	P	C	C	NP	P
Medical support laboratories	P	C	C	C	C
Optician and optometrist shop	P	P	P	NP	P
Pharmacy or drug store	NP	P	P	P	P

Sauna and steam bath	NP	NP	NP	P	NP
Veterinary clinic	NP	NP	P	P	P
4. Industrial Uses ⁴					
Assembly from pre-processed materials	NP	NP	C	NP	NP
Commercial fueling facility	NP	NP	NP	C	NP
Commercial laboratory	NP	NP	C	P	NP
Contractor's yards and offices	NP	NP	C	C	NP
Disinfection and extermination business	NP	NP	C	P	NP
Dry cleaning plant	NP	NP	NP	P	NP
Food storage locker	NP	NP	NP	P	NP
Landscape contractor	NP	NP	C	P	NP
Lumberyards	NP	NP	C	C	NP
Mini-storage complex	NP	NP	C	C	NP
Plumbing, metalworking, glassworking or woodworking	NP	NP	C	C	NP
Research & development	NP	NP	C	NP	NP
Sign sales and fabrication (Electric and neon sign, sign painting)	NP	NP	C	P	NP
Warehousing and wholesale	NP	NP	C	NP	NP
5. Lodging					
Hotel and motel	NP	NP	C	C	C
6. Professional Offices, Financial Institutions and Related Uses					
Automatic Teller Machines (freestanding) ⁵	NP	P	P	P	P
Financial institutions (banks, savings and loans, etc.)	P	P	P	P	P
General offices (administrative and business services, real estate, travel agencies, etc.)	P	P	P	P	P
7. Public, Quasi-Public and Assembly Uses					
Auction hall	NP	NP	C	C	C
Child care					
Child care center	C	C	C	C	C
Day care school	C	C	C	C	C
Large family child care home	NP	NP	NP	NP	C
Small family child care home	NP	NP	NP	NP	C
Club or social organization, religious assembly	C	C	C	C	C
Cultural center	NP	NP	C	C	C
Educational institutions					
Schools, private (-elementary, middle, high)	NP	NP	C	NP	C
Trade and vocational school	C	NP	P	P	C
Farmer's market (not including flea market)	NP	C	C	C	C
Instruction					
Group ⁷	MCS	MCS	MCS	MCS	MCS
Private	P	P	P	P	P
Motion picture theater					
Indoor	NP	C	C	C	C
Outdoor	NP	NP	NP	C	NP
Parking facility, storage garage	NP	P	P	C	C
Public utilities	C	C	C	C	C
Transportation facility (taxi, limousine, etc.)	NP	NP	C	C	C
8. Restaurants or Food Service					
Banquet hall	NP	NP	C	C	C

Bar or nightclub	NP	NP	C	C	C
Catering establishment	NP	NP	P	P	P
Restaurants	C ⁶	P	P	P	P
With live entertainment/dancing	NP	NP	C	C	C
With drive-in or drive-through	NP	C	C	C	C
With ancillary on-premise beer & wine with no separate bar	NP	MC	PMC	MC	MC
9. Residential Uses					
Caretaker (in conjunction with contractor's yard or mini-storage complex)	NP	NP	C	C	NP
Live-Work Units	NP	NP	NP	NP	C
Residential dwellings (between 1 and 40 d.u. per gross acre)	NP	NP	NP	NP	C
10. Vehicle Related Uses					
Auto repair (tire, oil change, smog check, etc.)	NP	NP	C	C	NP
Auto sales and rental, outdoor (new and used cars, RV and truck)	NP	NP	C	C	NP
Auto broker (wholesale, no vehicles on site) ⁷	MCS	MCS	MCS	MCS	MCS
Car wash	NP	NP	C	C	NP
Service stations (with or without repair or retail) ^{7,8}	C	C	C	C	C
Drive through uses (restaurants, pharmacies, etc.)	NP	C	C	C	C
11. Unclassified Uses					
Accessory structures ⁹	P	P	P	P	P
Model home complex ¹⁰	NP	NP	NP	NP	P
Mortuary or crematory	NP	NP	NP	C	NP
Radio or television station	NP	NP	C	P	NP
Temporary seasonal sales ¹¹	NP	P	P	P	P

¹ Refer to the definition for "Commercial Services" in Section 2, Definitions, of this Chapter.

² Provided that all incidental equipment and supplies, including fertilizer and empty cans, are kept within a building.

³ In accordance with the Title III, Chapter 4, Adult Business Ordinance, and Subsection XI-10-13.04, Adult Businesses, of this Chapter.

⁴ For conditionally permitted uses, refer to Subsection XI-10-57.04(C) (9), Certain Industrial Uses within Commercial Districts, of this Chapter.

⁵ Refer to Subsection XI-10-57.03, Site Development Permits and Minor Site Development Permits, of this Chapter.

⁶ When intended to serve the occupants and patrons of the permitted use (office, etc.) and conducted and entered from within the building and provided there is no exterior display of advertising.

⁷ Refer to Subsection XI-10-5.02-1, Commercial Zone Special Uses, of this Section.

⁸ Refer to Subsection XI-10-6.02-2, Special Uses, of this Chapter, for standards. Service stations shall follow the "General development policy: Gasoline service stations, and automotive service centers" adopted by the City Council on December 19, 1995.

⁹ Not including warehouses on the same site as the permitted use.

¹⁰ No tract sign shall be permitted within 600 feet of a Santa Clara County Expressway.

¹¹ Refer to Section XI-10-13.11, Temporary Uses and Structures, of this Chapter.

Table 12.07-1 entitled “Recreation & Entertainment Overlay District Uses” of the Milpitas Municipal Code is amended and replaced in its entirety to read as follows:

Table 12.07-1

Recreation & Entertainment Overlay District Uses

Use	C2	HS	MP	M1
1. Commercial Uses				
Alcoholic beverage sales	C	C	C ¹	C ¹
Art/photography studio or gallery	P	P	C	C
Bookstore	P	P	NP	NP
Business support services	P	P	P	P
Commercial services ²	P	P	P	P
Furniture sales	P	P	NP	C
Grocery store (supermarkets)				
Within 1,000 ft. of residential zone	C	C	NP	NP
Not within 1,000 ft. of residential zone	P	P	NP	NP
Head/Smoke/Tobacco shop	C	C	NP	NP
Home improvement (hardware, blinds, interior decorating, etc.)	P	C	NP	NP
Household appliance store	P	P	NP	NP
Janitorial services	P	P	P	P
Newsstand	P	P	P	P
Nursery (flower or plant)	P	P	NP	NP
Office supply sales (stationary, equipment)	P	P	C	C
Pawnshop	C	NP	NP	NP
Pet store	P	P	NP	NP
Rentals (medical supplies, costumes, party equipment, office equipment)	P	P	P	P
Retail stores, general merchandise	P	C	NP	NP
Thrift store	P	P	NP	NP
Tobacco Shop	C	C	NP	NP
2. Entertainment, Recreation & Food Services				
Amusement park	C	C	C	C
Aquatic center or park	C	C	C	C
Banquet hall	C	C	C	C
Bars or nightclubs (including dancing/entertainment)	C	C	C	C
Billiards	C	C	C	C
Bowling alley	P	C	C	C

Cafeteria	P	P	P	P
Card room	C	C	C	C
Catering establishment	P	P	P	P
Indoor motion picture theater	C	C	C	C
Internet access studio	C	C	C	C
Recreation or entertainment facility	C	C	C	C
Restaurants	P	P	P	P
(With drive-in and drive-thru)	C	C	C	C
Shooting range, indoor	NP	C	NP	NP
3. Health and Veterinarian Uses				
Animal grooming (no boarding)	P	P	NP	NP
Commercial athletic facilities	P	P	P	P
Hospitals	C	C	C	NP
Kennel	C	NP	NP	P
Massage establishment	C	C	NP	NP
Medical and dental clinic	C	NP	NP	P
Medical and dental office	P	NP	NP	P
Medical support laboratories	P	P	P	P
Optician and optometrist shop	P	NP	NP	NP
Pharmacy or drug store	P	P	NP	NP
Sauna and steam bath	C	P	NP	NP
Tanning salon	P	P	NP	NP
Veterinary clinic	C	C	P	P
4. Industrial Uses ³				
Assembly from pre-processed materials ⁴	C	P	P	P
Bottling facility	NP	NP	NP	P
Commercial laboratory	C	P	P	P
Distribution facility	NP	NP	P	P
Lumberyard	C	C	NP	NP
Mini-storage complex with or without caretaker residence	C	C	NP	C
Plant or facility (research & development, assembly, manufacturing, processing, repairing, etc. or materials, merchandise or products)	C	NP	P	P
Plumbing, sheet metal or woodworking	C	C	NP	P
Printing (newspaper, blueprint, publishing)	P	P	C	P
Recycling processing	NP	NP	NP	C

facility				
Sign sales and fabrication (electric and neon sign, sign painting)	C	P	NP	P
Warehousing and wholesale	C	P	P	P
5. Lodging				
Hotels/Motels	C	C	C	C
6. Professional Offices, Financial Institutions and Related Uses				
Automatic Teller Machines (freestanding) ⁵	P	P	P	P
Financial institutions (banks, savings and loans, etc.)	P	P	P	P
General office (administrative and business services, real estate, travel agencies, etc.)	P	P	P	P
7. Public, Quasi-Public and Assembly Uses				
Auction hall	C	C	C	C
Child Care				
Child care center	C	C	NP	NP
Day care school	C	C	NP	NP
Club or social organization	C	C	NP	NP
Conference center	C	C	C	C
Cultural center	C	C	C	C
Educational Institutions				
School-elementary (K-8 public or private)	C	NP	NP	NP
School-secondary (9-12 Public or Private)	C	NP	NP	NP
Trade or vocational school	P	P	C	C
Farmer's market (not including flea market)	C	C	C	C
Instruction				
Group	C	C	NP	NP
Private	P	P	NP	NP
Parking facility, storage garage	P	P	P	P
Public utilities	C	C	P	P
Religious assembly	C	C	NP	NP
Transportation facility (taxi, limousine, etc.)	C	C	NP	NP
8. Vehicle Related Uses				
Auto repair (tire, oil change, smog check, etc.) ^{6, 7}	C	C	C	C
Car wash	C	C	NP	NP
Service stations (with or without repair or retail) ⁸	C	C	C	NP
Vehicle rental (auto, RV and truck)	C	P	C	C

Vehicle sales (auto, RV and truck-new and used in operable condition) ⁹	C	C	C	C
Auto broker (wholesale, no vehicles on site)	C	C	C	C
9. Unclassified Uses				
Radio or television station	C	P	P	P
Temporary seasonal sales ¹⁰	P	P	NP	NP

Not including stand alone off-sale alcoholic beverage outlets (such as liquor stores).

Refer to the definition for "Commercial services" in Section XI-10-2, Definitions, of this Chapter.

Refer to Subsection XI-10-47.04(C)(9), Certain Industrial Uses within Commercial Districts, of this Chapter.

Assembling, packaging, or distribution from previously prepared materials, such as cloth, plastic, paper, leather, precious or semi-precious metals or stones, electric or electronic instruments and devices such as televisions, radios, and pharmaceutical products.

Refer to Subsection XI-10-57.03, Site Development Permits and Minor Site Development Permits, of this Chapter.

Entrances to the service bays shall not be open to the street, but shall be so designed to face the rear or interior side property line.

Within MP zones, rental and repair may be considered only when ancillary to new auto dealerships.

Entrances to the service bays shall not be open to the street, but shall be so designed to face the rear or interior side property line. Service stations shall follow the "General development policy: Gasoline service stations, and automotive service centers" adopted by the City Council on December 19, 1995.

Within MP zones, boat and camper sales are prohibited. Dealerships shall be on property at least three (3) acres or greater in area.

Refer to Section XI-10-13.11(D), Temporary Seasonal Sales, of this Chapter.

SECTION 3. SEVERABILITY

The provisions of this Ordinance are separable, and the invalidity of any phrase, clause, provision or part shall not affect the validity of the remainder.

SECTION 4. EFFECTIVE DATE AND POSTING

In accordance with Section 36937 of the Government Code of the State of California, this Ordinance shall take effect thirty (30) days from and after the date of its passage. The City Clerk of the City of Milpitas shall cause this Ordinance or a summary thereof to be published in accordance with Section 36933 of the Government Code of the State of California.